R. *v.* B. (C.R.), [1990] 1 S.C.R. 717

C.R.B. *Appellant*

v.

Her Majesty The Queen *Respondent*

indexed as: r. *v.* b. (c.r.)

File No.: 20704.

1989: October 30; 1990: April 12.

Present: Dickson C.J. and Lamer, Wilson, L'Heureux-Dubé, Sopinka, Gonthier and McLachlin JJ.

on appeal from the court of appeal for alberta

Criminal law -- Evidence -- Similar fact evidence -- Admissibility -- Sexual offences -- Accused convicted of sexual offences against his natural daughter -- Whether evidence of alleged prior acts of sexual misconduct by the accused with the daughter of his common law wife should have been admitted.

The accused was charged with sexual offences against his natural daughter, the complainant, who was in his custody subsequent to the death of her mother. At trial, the issue was not who had committed the offences but whether the complainant should be believed. The complainant testified that the acts of sexual misconduct by the accused began in 1981 when she was eleven

years old and continued for almost two years. According to her testimony, the acts occurred two or three times a week, progressing from fondling to oral sex, sexual intercourse and buggery. On occasion, she and the accused urinated on each other. To support her testimony, the Crown sought to introduce evidence that in 1975 the accused had had sexual relations with a 15-year-old girl, M.H.S., the daughter of his common law wife, with whom he had also enjoyed a father-daughter relationship. M.H.S., who was at the time already sexually active, testified that within a year of living in their home, the accused began making sexual advances towards her. It started with fondling and, ultimately, the accused had intercourse with her five or six times. In addition, oral sex and masturbation occurred. In his ruling on the *voir dire*, the trial judge set out the proper test for the reception of similar fact evidence but later stated that the admissibility of M.H.S.'s testimony depended on "whether the similarities are sufficient to show that the accused had common characteristics in the methods he used in the sexual acts with [the complainant and M.H.S.] and that it is likely that they are one and the same man". He admitted the evidence and, at the end of the trial, convicted the accused. The majority of the Court of Appeal held that the similar fact evidence was properly admitted and upheld the conviction. This appeal is to determine whether the Court of Appeal was correct in holding that the evidence was admissible, notwithstanding the trial judge's reference to identity and the distinctions relied on by the accused between the case alleged against him and the similar fact evidence.

Held (Lamer and Sopinka JJ. dissenting): The appeal should be dismissed.

Per Dickson C.J. and Wilson, L'Heureux-Dubé, Gonthier and McLachlin JJ.: Evidence which is adduced solely to show disposition or propensity is, as a rule, inadmissible. Whether the evidence in question constitutes an exception to the general rule depends on whether the probative value of the proposed evidence outweighs its prejudicial effect. Where, as in this

case, the similar fact evidence sought to be adduced is prosecution evidence of a morally repugnant act committed by the accused, the potential prejudice is great and the probative value of the evidence must be high to permit its reception. The trial judge must consider such factors as the degree of distinctiveness or uniqueness between the similar fact evidence and the offences alleged against the accused, as well as the connection, if any, of the evidence to issues other than propensity, for the purpose of determining whether, in the context of the case before him, the probative value of the evidence outweighs its potential prejudice and justifies its reception.

In this case, the trial judge did not err in admitting the evidence of M.H.S. He set out the proper test for the reception of similar fact evidence and clearly proceeded on the assumption that the evidence was *prima facie* inadmissible. The trial judge's concern with the degree of similarity between the two stories was proper. While his comment suggesting that the similar fact evidence related to the identity of the perpetrator, which was not in issue, was in error, his reasons for convicting show that he was not at all concerned with identity, and considered the central issue of the case to be whether the complainant should be believed. The fact that a trial judge misstates himself at one point should not vitiate his ruling if the preponderance of what was said shows that the proper test was applied and if the decision can be justified on the evidence. In the context of the ruling as a whole and all the circumstances, the error was not material and did not undermine the validity of the trial judge's decision. In general, however, a trial judge should, in cases involving highly prejudicial similar fact evidence, clearly indicate the issue to which the evidence is relevant.

Where identity or *mens rea* is not in issue, similar fact evidence may be useful in providing corroboration. Indeed, where, as in this case, the word of the child alleged to have been

sexually assaulted is pitted against the word of the accused, similar fact evidence may be helpful on the central issue of credibility.

Finally, it cannot be concluded from the similarities and dissimilarities between the evidence of the complainant and the similar fact evidence of M.H.S., and from the considerable lapse of time between the two alleged relationships, that the evidence necessarily fails the "high probative value" test. The fact that in each case the accused established a father-daughter relationship with the girl before the sexual violations began might arguably go to show, if not a system or design, a pattern of similar behaviour suggesting that the complainant's story is true. The question then is whether the probative value of the evidence outweighs its prejudicial effect. Even if the admissibility of the evidence is borderline, this Court should not interfere with the conclusion of the trial judge, who was charged with the task of weighing the probative value of the evidence against its prejudicial effect in the context of the case as a whole. Where the law accords a large degree of discretion to a trial judge, appellate courts should be reluctant to interfere with the exercise of that discretion in the absence of a demonstrated error of law or jurisdiction.

Per Lamer and Sopinka JJ. (dissenting): There is no special rule with relation to similar fact evidence in sexual offences. Similar fact evidence, to be admitted, must have relevance to an issue in the case other than to simply show a general disposition to commit the crime charged; and, if it does, its probative value must exceed its prejudicial effect. The identification of the probative value of the evidence is thus a crucial factor in the application of the similar fact rule. Evidence adduced solely for the purpose of showing propensity is inadmissible. In some circumstances, however, the acts of an accused are admissible, notwithstanding their tendency to show propensity, if those acts have a close or striking similarity to the act charged. The admission of similar fact evidence on this basis does not depart from the policy that evidence

of propensity alone is not to be admitted. There is a distinction between evidence of general character and *modus operandi*. What the law seeks to forbid is a process of reasoning that would condemn the accused because of the accused's character. A highly individualized *modus operandi* is tantamount to evidence that the accused left his calling card. The process of reasoning which connects the accused to the crime charged is the same as in the case of other evidence of identification and is distinguishable from the prohibited line of reasoning. In short, the basis for admitting the evidence is relevance other than mere propensity.

In the present case, the trial judge erred in admitting the evidence. He misstated the relevance of the evidence and did not determine whether the prejudicial effect of the evidence outweighed its probative value. It is pure speculation to say that he treated the evidence as relevant to the issue of the credibility of the complainant. Assuming, however, that the trial judge's statement accepting the evidence of the complainant can be construed as relating the similar fact evidence to that issue, it was an insufficient identification of relevance to an issue. The complainant's credibility in this case was co-extensive with the issue of innocence or guilt. The Crown's case was based almost entirely on the evidence of the complainant, and the defence was a denial of the complaint. Any relevant evidence having the tendency to show guilt could be said to be relevant to the issue of credibility of the complainant. More specific identification was required: both the relevance of the evidence and its use for a purpose not prohibited by law had to be clearly identified.

The fact that the alleged similar facts had common characteristics with the acts charged did not render them admissible, and therefore, supportive of the evidence of the complainant. In order to be admissible, it would be necessary to conclude that the similarities were such that absent collaboration, it would be an affront to common sense to suggest that the similarities were due to coincidence. There is nothing in the reasons of the trial judge to suggest that the

evidence was considered in light of these principles. In any event, the common characteristics in the evidence of the two girls were not so unusual that it would be against common sense to conclude that they were not both telling the truth. The two cases were separated by a considerable passage of time and there were material differences as well. The fact that the accused in each case established a father-daughter relationship was not so exceptional. With respect to collaboration, although the Crown must negate conspiracy or collaboration in accordance with the criminal standard, no attempt was made to negate the possibility of collaboration.

The fact that similar fact evidence is useful as corroborative evidence for the testimony of children is not a basis for admissibility. Before evidence can be treated as corroborative, it must be found to be admissible.

Cases Cited

By McLachlin J.

Considered: *Director of Public Prosecutions v. Boardman*, [1975] A.C. 421; **referred to**: *Makin v. Attorney-General for New South Wales*, [1894] A.C. 57; *Cloutier v. The Queen*, [1979] 2 S.C.R. 709; *Morris v. The Queen*, [1983] 2 S.C.R. 190; *R. v. Morin*, [1988] 2 S.C.R. 345; *R. v. D. (L.E.)*, [1989] 2 S.C.R. 111; *R. v. Scopelliti* (1981), 63 C.C.C. (2d) 481; *Guay v. The Queen*, [1979] 1 S.C.R. 18; *Sweitzer v. The Queen*, [1982] 1 S.C.R. 949; *R. v. Robertson*, [1987] 1 S.C.R. 918; *R. v. Mansfield* (1977), 65 Cr. App. R. 276; *R. v. Scarrott*, [1978] Q.B. 1016; *Sutton v. The Queen* (1984), 152 C.L.R. 528; *Harris v. Director of Public Prosecutions*, [1952] A.C. 694; *R. v. Campbell*, [1956] 2 All E.R. 272; *R. v. Hampden* (1684), 9 How. St. Tr. 1053; *R. v.*

Hall (1887), 5 N.Z.L.R. 93; *R. v. Wray*, [1971] S.C.R. 272; *R. v. Rance* (1975), 62 Cr. App. R. 118.

By Sopinka J. (dissenting)

Director of Public Prosecutions v. Kilbourne, [1973] A.C. 729; *Director of Public Prosecutions v. Boardman*, [1975] A.C. 421; *Makin v. Attorney-General for New South Wales*, [1894] A.C. 57; *R. v. Sims*, [1946] K.B. 531; *Cloutier v. The Queen*, [1979] 2 S.C.R. 709; *Sweitzer v. The Queen*, [1982] 1 S.C.R. 949; *Morris v. The Queen*, [1983] 2 S.C.R. 190; *R. v. Robertson*, [1987] 1 S.C.R. 918; *R. v. D. (L.E.)*, [1989] 2 S.C.R. 111, rev'g (1987), 20 B.C.L.R. (2d) 384; *Harris v. Director of Public Prosecutions*, [1952] A.C. 694; *R. v. Straffen*, [1952] 2 Q.B. 911.

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Sklar, Ronald B. "Similar Fact Evidence -- Catchwords and Cartwheels" (1977), 23 *McGill L.J.* 60.

APPEAL from a judgment of the Alberta Court of Appeal (1987), 56 Alta. L.R. (2d) 20, 82 A.R. 45, 39 C.C.C. (3d) 230, dismissing the accused's appeal from his convictions on charges

of incest, gross indecency, buggery and sexual intercourse with a female under the age of 14 years. Appeal dismissed, Lamer and Sopinka JJ. dissenting.

Terence Semenuk, for the appellant.

Lindsay MacDonald, for the respondent.

//*McLachlin J.*//

The judgment of Dickson C.J. and Wilson, L'Heureux-Dubé, Gonthier and McLachlin JJ. was delivered by

McLachlin J. -- The accused was charged with sexual offences against a young child, his natural daughter. The issue was not who had committed the offences but whether they had occurred at all. The main Crown evidence was that of the child. The question was whether she should be believed.

In support of the child's testimony, the Crown sought to introduce evidence that the accused had previously had sexual relations with an older girl, the daughter of his common law wife, with whom he had enjoyed a father-daughter relationship. The trial judge admitted the evidence and convicted the accused. Although the judge appears to have applied the correct test, a comment suggesting that the similar fact evidence related to the issue of identity was in error. The Court of Appeal, Harradence J.A. dissenting, held that the similar fact evidence was properly admitted and upheld the conviction: (1987), 56 Alta. L.R. (2d) 20.

The question before us is whether the majority of the Court of Appeal was correct in holding that the evidence was admissible, notwithstanding the trial judge's reference to identity and the distinctions relied on by the accused between the case alleged against him and the similar fact evidence.

The Test for Similar Fact Evidence

The common law has traditionally taken a strict view of similar fact evidence, regarding it with suspicion. In recent years, the courts have moved to loosen the formalistic strictures which had come to encumber the rule. The old category approach determining what types of similar fact evidence are admissible has given way to a more general test which balances the probative value of the evidence against its prejudice.

Despite the apparent simplicity of the modern rule for the admission of similar fact evidence, the rule remains one of considerable difficulty in application. The problems stem in part from a tendency to view the modern formulation of the rule in isolation from the historical context from whence it springs. While the contemporary formulation may permit a more flexible, less restricted analysis, the dangers which it addresses and the principles upon which it rests remain unchanged.

The Similar Fact Rule in England

As late as the 17th century, English law contained no rule preventing the admission of either character or similar fact evidence. Occasionally one finds a reference to the potential unfairness of such evidence, such as the comment of the judge in *R. v. Hampden* (1684), 9

How. St. Tr. 1053, that "[t]o rake the whole course of a man's life is very hard." But in general, such evidence was admitted.

This changed in the 17th century. Because the common law had no firm rule against even the cruder forms of character evidence, a statute was enacted in 1695 that in cases of treason (of which there were many at the time) the prosecution should be limited to proof of the acts set out in the indictment. While the ambit of the statute was narrow, the idea which it embodied increasingly found favour in the courts. In 1762 a text writer named Foster (*Crown Law* (1762), at p. 246), referred to the "rule of rejecting all manner of evidence in criminal prosecutions that is foreign to the point in issue", stating the rule is "founded on good sense and common justice. For no man is bound . . . to answer at once and unprepared for every action of his life. . . ." A modern commentator summarizes the situation in the 18th century as follows:

> In the 18th century the English courts resolved to confine evidence more closely to the matter in hand. In particular juries should not hear an accused's criminal record or the free-ranging denigration. . . . Evidence of that sort was seen to be insufficiently relevant. Indeed it was worse because, while the legal mind may transcend such distractions, lay juries, it was held, could not.
>
> (J. R. S. Forbes, *Similar Facts* (1987), at p. v.)

The same writer concludes at p. 7: "By 1800 the law of evidence was apt to exclude general character evidence, even if it still admitted similar facts fairly liberally."

The legal formalism and emphasis on *stare decisis* that marked the 19th century approach to law narrowed the scope for the admission of similar fact evidence. Cases in which similar

fact evidence had been admitted were reified into a series of categories in which, and only in which, similar fact evidence could be admitted. Similar fact evidence was admitted to show intent, a system, a plan, malice, identity, as well as to rebut the defences of accident, mistake and innocent association.

Nineteenth century courts started from the premise that a person should not be convicted on the basis that he had committed other offences. They developed a general exclusionary rule with the following exception: evidence of previous misconduct could be admitted if it possessed special probative value, making it useful for some other inference over and above the inference that because the accused had committed a crime before he was likely to have committed the offence with which he stood charged. Whether or not this exception was established was determined by asking whether the evidence fell into one of the established categories of admissibility. Viewed thus, the so-called similar fact rule was in reality an exception -- narrowly defined -- to the general rule excluding evidence of prior misconduct or propensity.

This approach is embodied in the oft-quoted passage from *Makin v. Attorney-General for New South Wales*, [1894] A.C. 57, at p. 65. Lord Herschell L.C. first enunciated the general principle of exclusion (the first limb of the rule):

> It is undoubtedly not competent for the prosecution to adduce evidence tending to shew that the accused has been guilty of criminal acts other than those covered by the indictment, for the purpose of leading to the conclusion that the accused is a person likely from his criminal conduct or character to have committed the offence for which he is being tried.

He then stated the exception (the second limb of the rule), at p. 65:

> On the other hand, the mere fact that the evidence adduced tends to shew the commission of other crimes does not render it inadmissible if it be relevant to an issue before the jury, and it may be so relevant if it bears upon the question whether the acts alleged to constitute the crime charged in the indictment were designed or accidental, or to rebut a defence which would otherwise be open to the accused.

From the point of view of underlying principle, the *Makin* rule may be seen as essentially concerned with probative value. On the one hand, it recognized the grave prejudice that evidence of previous wrongdoing or propensity might work. Such evidence often does not possess great logical or probative force. Yet at the same time it has great potential for harm, raising the danger that the jury may convict, not because they are satisfied that the Crown has proved beyond a reasonable doubt that the accused committed the offence with which he stands charged, but because the accused is a bad or suspicious person. On the other hand, the *Makin* rule acknowledged the common sense proposition that in some cases the probative value of the evidence might justify its reception.

As a rule of application the analysis in *Makin* typically involved two steps. Courts first asked whether the proposed evidence went beyond mere propensity. If that hurdle was met, they went on to determine whether the evidence fell within one of the accepted exclusionary categories. In practice, the two steps often merged since evidence falling within the established categories of exception to the general exclusionary rule usually went beyond mere propensity.

Problems with the category approach to similar fact evidence became increasingly apparent in the less formalistic 20th century. On the one hand, the effect of the categories and the frequently referred to requirement of "striking similarity" was that similar fact evidence, which from the point of view of common sense had great relevance, might be excluded -- a result which provoked one judge to declaim:

> Viewed in the light of science . . . or common sense, there is without doubt a nexus. . . .
>
> . . . the common law must often result in what the public may regard as a failure of justice. That is really not our concern.
>
> (*R. v. Hall* (1887), 5 N.Z.L.R. 93 (C.A.), at pp. 108 and 110.)

Other judges reacted to the tendency of the rule to exclude probative evidence, by drawing distinctions that were fundamentally unworkable or imaginary in order to admit evidence which common sense told them should be admitted. On the other hand, the rule sometimes permitted reception of evidence of doubtful worth. Provided it fell within one of the accepted categories, evidence of prior misconduct or inclination might be admitted even though its relevance was suspect.

From the point of view of theory too, the category approach associated with *Makin* was subject to criticism. The categories focussed attention on the purpose for which the similar fact evidence was adduced, rather than the real question -- its relevance: see J. A. Andrews and M. Hirst, *Criminal Evidence* (1987), para. 15.34. As R. B. Sklar stated ("Similar Fact Evidence -- Catchwords and Cartwheels" (1977), 23 *McGill L.J.* 60, at p. 62), "[w]hether the evidence was really *relevant* to the issue by whatever the rationale and whether, if it was, it was *relevant enough* to justify its reception despite its nearly uncontrollable tendency to damn the accused in the minds of the jury, was lost in the shuffle." (Emphasis in original.) If the evidence fell within a recognizable category, it was admitted even if its relevance may have been suspect. Moreover, the emphasis on the need for the evidence to relate to an issue other than disposition was arguably artificial. As Professor Andrews and Mr. Hirst have commented, at pp. 342-43:

> **15.37** Although the courts made a great show of relying on the categories of relevance and of avoiding the forbidden chain of reasoning [guilt from propensity], their whole approach

> was really based upon a fundamental misconception. In reality, similar fact evidence can hardly ever show design or rebut a defence except by encouraging the court or jury to utilise the forbidden chain of reasoning. Whether the judges realised this or not, the undeniable fact is that in many of the leading cases evidence was admitted where it could only have been relevant because it showed disposition or propensity.

Provided some element, however small, other than disposition could be found to which the evidence related, it went in, although the effect might be almost entirely related to disposition.

Difficulties such as these led the House of Lords to re-address the question of similar fact evidence in *Director of Public Prosecutions v. Boardman,* [1975] A.C. 421. On its face, *Boardman* constitutes no great departure from *Makin*, with three of the five Law Lords (Lords Morris, Hailsham and Salmon) expressly affirming the validity of *Makin*. However, all five judges rejected the category approach that had become associated with *Makin*, emphasizing that similar fact evidence is not automatically admissible merely because it fits into a prescribed category. The admissibility of similar fact evidence was to be based on general principle, not categories and catch phrases. That general principle was relevance.

While the five separate and sometimes conflicting opinions delivered in *Boardman* may not provide a comprehensive picture of the various ways in which cogency may be found, the *ratio decidendi* of the case is clear: the admissibility of similar fact evidence depends on its bearing a very high degree of probative value -- sufficient to outweigh the inherent prejudice likely to flow from its reception. In the result, the House of Lords in *Boardman* held that the similar fact evidence in question was admissible on the ground of high probative value or "striking similarity", Lords Wilberforce and Cross expressing the reservation that they regarded the case as "borderline".

If the judges in *Boardman* were not willing to overrule *Makin*, some were prepared to engage an interpretation different from that which has been traditionally accorded the case. A majority of the judges accepted the first limb of the rule in *Makin* -- the exclusionary proposition -- although arguably in modified form. Lord Hailsham embraced in unequivocal terms the proposition that similar fact evidence merely going to show character or disposition is always inadmissible on the ground of irrelevancy (p. 451). The other judges, while emphasizing the importance of the general exclusionary rule against character and disposition, were prepared to accept that in exceptional circumstances evidence going only to disposition might be admissible. This marked a significant departure from the established position. The jurisprudence following on *Makin* had proceeded on the assumption that the evidence must relate to something other than disposition; mere disposition evidence could never be admitted. In *Boardman* the majority of the court accepted that a court or jury may properly infer guilt from evidence of disposition where the high and specific relevance of that evidence warrants such an inference.

On the second branch of the *Makin* rule, the speeches in *Boardman* emphasize Lord Herschell L.C.'s reference in *Makin* to the relevance of the evidence to an issue before the jury, while rejecting as definitive his allusion to the traditional categories of admissible similar fact evidence. All judges affirmed that in determining if the proffered evidence is admissible the courts must look primarily to its logical force in the context of the case and balance it against its potential prejudice to the accused.

Two points emerge from the foregoing discussion of *Boardman*. The first is the reaffirmation of the importance of a general exclusionary rule for evidence which goes merely to character or disposition and nothing more, albeit in a qualified form. For all the judges, it is from this rule that consideration of the admissibility of similar fact evidence begins.

Boardman does not take us back to the 17th century where evidence of character and disposition could be freely received. Rather it formulates a new and essentially strict test for the reception of such evidence, which is admitted as an exception to the general exclusionary rule as a consequence of its high probative force.

The second point emerging from *Boardman* is the proposition that to be admissible, the probative force of the evidence must outweigh its potential prejudice in all the circumstances of the case. This introduces the idea of a sliding scale of admissibility. The degree of probative value required to establish the admissibility of similar fact evidence will generally be high where the evidence is Crown evidence suggesting serious criminality or immorality, as was the case in *Boardman*; hence their Lordships' insistence on such phrases as "striking similarity", the potential of the evidence to negate all "coincidence", "exceptional circumstances" and a "strong degree of probative force". Yet the possibility is left open that in other cases, where there is less prejudice to overcome (for example, in similar fact evidence presented by the defence or evidence of habits or business practices in civil cases) the degree of probative value required for admission may be lower.

This view of similar fact evidence posits a test which is related to, yet distinct from the general rule that evidence is not admissible if its prejudicial effect outweighs its probative value: see *R. v. Wray*, [1971] S.C.R. 272. That rule is an exclusionary rule applied to evidence which would otherwise be admissible. The reverse is the case with similar fact evidence. In determining its admissibility, one starts from the proposition that the evidence is inadmissible, given the low degree of probative force and the high degree of prejudice typically associated with it. The question then is whether, because of the exceptional probative value of the evidence under consideration in relation to its potential prejudice, it should be admitted notwithstanding the general exclusionary rule.

The Canadian Jurisprudence

The Canadian jurisprudence since *Boardman* is generally consistent with the approach advocated in that case. It has followed *Boardman* in rejecting the category approach to the admission of similar fact evidence. At the same time, cases in Canada have on the whole maintained an emphasis on the general rule that evidence of mere propensity is inadmissible, and have continued to emphasize the necessity that such evidence possess high probative value in relation to its potential prejudice.

This Court has repeatedly affirmed since *Boardman* that the starting point for determining whether similar fact evidence is admissible is the general exclusionary rule against the reception of evidence of disposition or character, aligning itself with the view of the majority in *Boardman* on this aspect of the rule. In *Cloutier v. The Queen*, [1979] 2 S.C.R. 709, Pratte J., for the majority, held that in general similar fact evidence merely going to show disposition is inadmissible because it has "no real probative value with regard to the specific crime attributed to the accused: there is no sufficient logical connection between the one and the other" (p. 731). Applying the rule from *R. v. Rance* (1975), 62 Cr. App. R. 118, at p. 121, he stated that similar fact evidence is admissible "if, but only if, it goes beyond showing a tendency to commit crimes of this kind and is positively probative in regard to the crime now charged" (p. 735). Similarly, in *Morris v. The Queen*, [1983] 2 S.C.R. 190, Lamer J. (whose statements on this point may be considered to be the unanimous view of the Court) cited with approval Lord Cross's statement in *Boardman* that in cases of exceptional probative value, evidence going to disposition might be admissible. More recently, Sopinka J., speaking for this Court in *R. v. Morin*, [1988] 2 S.C.R. 345, and in *R. v. D. (L.E.)*, [1989] 2 S.C.R. 111, affirmed the general inadmissibility of evidence of disposition. To similar effect, Martin J.A.,

speaking for the Ontario Court of Appeal in *R. v. Scopelliti* (1981), 63 C.C.C. (2d) 481, stated at p. 496:

> . . . the admission of similar fact evidence against an accused is exceptional, being allowed only if it has substantial probative value on some issue, otherwise than as proof of propensity (unless the propensity is so highly distinctive or unique as to constitute a signature).

While our courts have affirmed the general exclusionary rule for evidence of disposition and propensity, they have for the most part cast it in terms of *Boardman* rather than *Makin*. It is no longer necessary to hang the evidence tendered on the peg of some issue other than disposition. While the language of some of the assertions of the exclusionary rule admittedly might be taken to suggest that mere disposition evidence can never be admissible, the preponderant view prevailing in Canada is the view taken by the majority in *Boardman* -- evidence of propensity, while generally inadmissible, may exceptionally be admitted where the probative value of the evidence in relation to an issue in question is so high that it displaces the heavy prejudice which will inevitably inure to the accused where evidence of prior immoral or illegal acts is presented to the jury.

The second characteristic of Canadian treatment of the similar fact rule since *Boardman* is a rejection of the category approach in favour of one of general principle. In *Guay v. The Queen*, [1979] 1 S.C.R. 18, the Court, *per* Pigeon J., held that the admissibility of similar fact evidence is based on "general principles" and that there is discretionary power in the trial judge to exclude such evidence (p. 32). Citing *Boardman* with approval, he rejected a mechanical, category approach, holding that there is "no closed list of the sort of cases where such evidence is admissible" but that it is "well established that it may be admitted to rebut a

defence of legitimate association for honest purposes, as well as to rebut evidence of good character" (p. 32).

In *Sweitzer v. The Queen*, [1982] 1 S.C.R. 949, McIntyre J., speaking for the Court, held that "it would be an error to attempt to draw up a closed list of the sorts of cases in which the principle operates" (p. 953), concluding that the admissibility of similar fact evidence "will depend upon the probative effect of the evidence balanced against the prejudice caused to the accused by its admission whatever the purpose of its admission" (p. 953). Subsequent cases have all affirmed the same approach. In *R. v. Robertson*, [1987] 1 S.C.R. 918, at p. 943, Wilson J., speaking for the Court, affirmed that the analysis must be based on general principle and posited a sliding scale of relevance:

> The degree of probative value required varies with the prejudicial effect of the admission of the evidence. The probative value of evidence may increase if there is a degree of similarity in circumstances and proximity in time and place. However, admissibility does not turn on such a striking similarity. . . .

The old category approach was similarly rejected in *R. v. Morin* and *R. v. D. (L.E.)*

Catchwords have gone the same way as categories. Just as English courts have expressed doubts about the necessity of showing "striking similarity" (see *R. v. Rance*, *supra*; *R. v. Mansfield* (1977), 65 Cr. App. R. 276; *R. v. Scarrott*, [1978] Q.B. 1016), so in *Robertson* Wilson J. rejected the validity of this phrase as a legal test.

A third feature of this Court's treatment of the similar fact rule since *Boardman* is the tendency to accord a high degree of respect to the decision of the trial judge, who is charged with the delicate process of balancing the probative value of the evidence against its

prejudicial effect. In *Morris*, the Court affirmed that the task of determining whether the evidence possesses sufficient probative value is that of the trial judge. Similarly, in *Guay*, *Robertson*, *Morin*, and *D. (L.E.)* this Court affirmed the decision of the trial judge with respect to similar fact evidence. This deference to the trial judge may in part be seen as a function of the broader, more discretionary nature of the modern rule at the stage where the probative value of the evidence must be weighed against its prejudicial effect. As a consequence of the rejection of the category approach, the admissibility of similar fact evidence since *Boardman* is a matter which effectively involves a certain amount of discretion. As pointed out in *Morris*, the weight to be given to evidence is a question for the trier of fact. Generally, where the law accords a large degree of discretion to a trial judge, courts of appeal are reluctant to interfere with the exercise of that discretion in the absence of demonstrated error of law or jurisdiction.

The difficulty of the trial judge's task and the amount of discretion entrusted to him or her is great. As Forbes, op. cit., puts it at pp. 54-55:

> A judge presented with similar facts for the prosecution has to exercise an extraordinary complex of duties and powers. First he has to assess not only the relevance but also the weight of the disputed evidence, although the latter task is normally one for the jury. Second, he must somehow amalgamate relevance and weight to arrive at "probative value". Third, and with due regard to the exclusory presumption, he has to outweigh that probative value, in some rough balance if [*sic*] imponderables, against any prejudice which the evidence is likely to excite in the jurors' minds.
>
> > "The relative weight of proof and prejudice vary infinitely from one case to another and the opinion of a particular judge must depend on the impression the evidence makes upon him in the light of his experience and his own sense of what is fair. It is inevitable that some cases are so close to the borderline that different judges will take different views upon them, and it is, therefore the type of case in which this court will hesitate long to disturb a ruling of the trial judge. . . . (T)he matter in issue is to be determined very largely by intuitive means. . . ."

Where a trial judge has properly addressed these concerns and, after weighing the evidence and its potential prejudice, arrived at a conclusion as to its admissibility, appellate courts will not lightly intervene.

Other principles of importance emerge in the recent jurisprudence. One is the view taken in *Boardman* (p. 457) that the effect of the similar fact evidence must be considered in the context of other evidence in the case. Thus Sopinka J. writes in *R. v. Morin*, at p. 370:

> It is difficult and arguably undesirable to lay down stringent rules for the determination of the relevance of a particular category of evidence. Relevance is very much a function of the other evidence and issues in a case.

See also *Sutton v. The Queen* (1984), 152 C.L.R. 528 (H.C. Aust.), at pp. 532-33.

This review of the jurisprudence leads me to the following conclusions as to the law of similar fact evidence as it now stands in Canada. The analysis of whether the evidence in question is admissible must begin with the recognition of the general exclusionary rule against evidence going merely to disposition. As affirmed in *Boardman* and reiterated by this Court in *Guay*, *Cloutier*, *Morris*, *Morin* and *D. (L.E.)*, evidence which is adduced solely to show that the accused is the sort of person likely to have committed an offence is, as a rule, inadmissible. Whether the evidence in question constitutes an exception to this general rule depends on whether the probative value of the proposed evidence outweighs its prejudicial effect. In a case such as the present, where the similar fact evidence sought to be adduced is prosecution evidence of a morally repugnant act committed by the accused, the potential prejudice is great and the probative value of the evidence must be high indeed to permit its reception. The judge must consider such factors as the degree of distinctiveness or uniqueness between the similar fact evidence and the offences alleged against the accused, as well as the connection,

if any, of the evidence to issues other than propensity, to the end of determining whether, in the context of the case before him, the probative value of the evidence outweighs its potential prejudice and justifies its reception.

Against this background, I turn to the facts in this case and the ruling of the trial judge.

Application of the Test for Similar Fact Evidence to this Case

The accused was charged with sexual offences against his natural daughter, who was in his custody subsequent to the death of her mother. For a time after the child came to live with the accused, he acted as one would expect of a natural father. However, within a few months thereafter he was alleged to have commenced sexual practices with the child. The girl testified that these incidents began in October or November 1981, when she was eleven years old and continued to September 1983, when she was thirteen. According to her, the acts occurred two or three times a week, progressing from fondling to fellatio, cunnilingus, sexual intercourse and buggery. On occasion, the girl testified, she and the accused urinated on each other.

The similar fact evidence which the Crown sought to adduce may be summarized as follows. Another girl, M.H.S., who was twenty-six at the time of trial, testified that she had been living with her mother in 1974 when the accused moved in with them. She was fifteen at the time. After about six months she found the accused "comfortable to be with as a father." At the time M.H.S. had a boyfriend with whom she had sexual intercourse. M.H.S. testified that within a year of moving in, the accused began making sexual advances toward her. It started with fondling and progressed from there. Ultimately, the accused had intercourse with her five or six times. In addition, fellatio, cunnilingus and masturbation

occurred. In late 1975, M.H.S. moved out of the house to live with another man, with whom she also had intercourse. After returning briefly to her mother's home, she moved out for good at age seventeen. At eighteen she became a prostitute, and remained one for three years.

Did the trial judge err in admitting the evidence of M.H.S? In the reasons for his ruling, he stated the correct test. He clearly proceeded on the assumption that the evidence was *prima facie* inadmissible, going on to note that its reception "depend[s] upon the probative effect of [the] evidence balanced against the prejudice caused the accused by its admission, whatever the purpose of its admission." However, he erred in later stating that the appropriate test for the probative effect of the evidence was "whether the similarities are sufficient to show that the accused had common characteristics in the methods he used in the sexual acts with [the two girls] and that it is likely that they are one and the same man." While the trial judge's concern with the degree of similarity between the two stories was proper, he appears to have viewed the similar fact evidence as going to the identity of the perpetrator, which was not in issue. As Hetherington J.A., writing for the majority of the Court of Appeal, pointed out, "the admissibility of the evidence of M.H.S. depended on whether its probative value with respect to the credibility of A.L.B. [the alleged victim] outweighed its prejudicial effect" (p. 37). (Emphasis added.)

I find it difficult to conclude that this error warrants concluding that the trial judge proceeded on the wrong basis. Immediately before this statement, the trial judge set out the proper test for the reception of similar fact evidence and referred to the appropriate authorities. His reasons for convicting show that he was not at all concerned with identity, and regarded the central issue of the case to be whether the complainant should be believed. The fact that a trial judge misstates himself at one point should not vitiate his ruling if the preponderance of what was said shows that the proper test was applied and if the decision can be justified on

the evidence. The question is whether, in the context of the ruling as a whole and all the circumstances, the error was material. In this case, I cannot conclude that it was material.

This aspect of the case is similar to *Guay v. The Queen* where the issue, as here, was the admissibility of similar fact evidence. The trial judge admitted the evidence. At the Court of Appeal, Rinfret J.A. found that the evidence was properly admissible. Crête J.A. felt that the evidence was inadmissible, but relying on s. 613 of the *Criminal Code*, concluded the conviction should stand. Dubé J.A., dissenting, found that the trial judge erred in law by incorrectly referring to an inapplicable decision, *Harris v. Director of Public Prosecutions*, [1952] A.C. 694 (H.L.) In this Court, Pigeon J. found that while the trial judge referred to *Harris*, he nevertheless relied mainly on another decision, *R. v. Campbell*, [1956] 2 All E.R. 272 (C.C.A.) As the *Campbell* decision was correctly applied and as his judgment showed that he was aware of the danger of convicting in cases of this kind, this Court concluded that there was no reason for substituting a different assessment of the evidence for his.

The difficulty may have arisen in this case from the failure of the trial judge to spell out the issue to which the similar fact evidence was relevant. It seems to me that the better practice in cases involving highly prejudicial similar fact evidence is for the judge to clearly indicate the issue to which the evidence is relevant. This is particularly the case if there is a jury. However, notwithstanding the trial judge's failure to follow this practice in the case at bar, I am satisfied on reading the whole of his reasons that he clearly appreciated that the similar fact evidence in question was relevant only to the issue of whether the complainant should be believed.

If the trial judge's erroneous reference to the issue of identity in outlining the test for similar fact evidence was not material, then that error does not undermine the validity of his decision.

In these circumstances the view taken by this Court in *Morris* and affirmed in subsequent cases applies in this case, namely, that deference must be paid to the trial judge's conclusion on where the balance between prejudice and probative value lies with respect to a particular piece of similar fact evidence.

It is well established that similar fact evidence may be useful in providing corroboration in cases where identity or *mens rea* is not in issue. Andrews and Hirst, op. cit., para. 15.27 write:

> **15.27** A third important use of similar fact evidence is to provide corroboration, particularly in cases involving sexual offences or offences against children, where the law either requires corroboration or requires the judge to warn the jury of the dangers of convicting in its absence. In many such cases there may be no possibility of mistaken identification, nor, if the witness is to be believed, any doubt as to the criminality of the acts committed. The only doubt will then be whether the complainant is indeed telling the truth.

As noted earlier, the probative value of similar fact evidence must be assessed in the context of other evidence in the case. In cases such as the present, which pit the word of the child alleged to have been sexually assaulted against the word of the accused, similar fact evidence may be useful on the central issue of credibility.

Against that background, I turn to the similarities between the evidence of the complainant and the similar fact evidence of M.H.S. The main similarity is that in each case the accused, shortly after establishing a father-daughter relationship with the victim, is alleged to have engaged her in a sexual relationship. Additionally, the trial judge detailed similarities relating to the place and manner in which the relations occurred in the two situations. The age of the girls was different; one was sexually mature, the other only a child when the acts began. One girl was a blood relation, the other was not. While many of the acts were the same, there is

no suggestion of urination with M.H.S. And there is a considerable lapse of time between the two alleged relationships.

That said, it cannot be concluded that the evidence necessarily fails the test indicated by the authorities to which I earlier referred. The fact that in each case the accused established a father-daughter relationship with the girl before the sexual violations began might be argued to go to showing, if not a system or design, a pattern of similar behaviour suggesting that the complainant's story is true. The question then is whether the probative value of the evidence outweighs its prejudicial effect. While I may have found this case to have been a borderline case of admissibility if I had been the trial judge, I am not prepared to interfere with the conclusion of the trial judge, who was charged with the task of weighing the probative value of the evidence against its prejudicial effect in the context of the case as a whole.

I would dismiss the appeal and affirm the conviction.

//*Sopinka J.*//

The reasons of Lamer and Sopinka JJ. were delivered by

Sopinka J. (dissenting) -- I have read the reasons for judgment of Justice McLachlin and I regret that I am unable to agree with her conclusion. My disagreement is both with the application of the principles relating to similar fact evidence and the admission of the evidence in the case.

<u>Similar Fact Evidence</u>

There is no special rule with relation to similar fact evidence in sexual offences. The House of Lords so held in *Director of Public Prosecutions v. Kilbourne*, [1973] A.C. 729, at p. 751, reaffirmed in *Director of Public Prosecutions v. Boardman*, [1975] A.C. 421. At page 443, Lord Wilberforce stated:

> Evidence that an offence of a sexual character was committed by A against B cannot be supported by evidence that an offence of a sexual character was committed by A against C, or against C, D and E.

There is no support in the cases in our Court for the theory that the rule has special application in sexual offences. Accordingly, evidence that the accused has a propensity to molest children or his or her own children is never admissible solely for that purpose.

In order to be admitted, the alleged similar acts must have relevance other than to simply show a general disposition to commit the crime charged. This formulation of the rule has been repeated *ad nauseam* in the cases starting with *Makin v. Attorney-General for New South Wales*, [1894] A.C. 57 (P.C.), and is a distillation of the two branches of Lord Herschell L.C.'s famous dictum in that case. It was summed up by Lord Goddard C.J. in the following sentence in *R. v. Sims*, [1946] K.B. 531, at p. 537:

> Evidence is not to be excluded merely because it tends to show the accused to be of a bad disposition, but only if it shows nothing more.

In *Phipson on Evidence* (12th ed. 1976), the rule and its application are dealt with in the following passages, at p. 175:

> . . . evidence is not admissible

(1) of similar acts done by himself, if they do no more than show a general disposition, habit or propensity to commit such acts and a consequent probability of his having committed the act, or possessed the state of mind in question, and

(2) of similar acts done by others, similarly circumstanced to himself, to show that he would be likely to act as they did.

And at p. 179:

1. The admission of similar fact evidence is exceptional and requires a strong degree of probative force.

2. It is for the judge to decide firstly as a matter of law and then as a matter of discretion whether the evidence should be admitted. Two questions have to be answered: (i) is the evidence of similar fact admissible *i.e.* relevant? (ii) if so, should the judge refuse to admit it as a matter of discretion *i.e.* does the prejudicial effect of the evidence outweigh its probative force? In practice the two questions tend to merge into one. As has been noted the reason for not admitting the evidence of similar facts is that such evidence may weigh too heavily with a jury. Hence the question can be put in this way: is there sufficient probative force in the similar fact evidence to get over the first hurdle of relevance and then over the much more difficult hurdle of outweighing the prejudicial effect?

This approach has been uniformly accepted by this Court before and after the decision in *Boardman*, *supra*. In *Cloutier v. The Queen*, [1979] 2 S.C.R. 709, at p. 732, Pratte J., for the majority, quoted with approval the following passage from the judgment of Lord Salmon in *Boardman*:

The test must be -- is the evidence capable of tending to persuade a reasonable jury of the accused's guilt on some ground other than his bad character and disposition to commit the sort of crime with which he is charged?

He continued at pp. 734-35:

> This is a case for the application of the rule in *Rance and Herron* (1975), 62 Cr. App. R. 118, at p. 121, regarding similar fact evidence, which was recently approved in *Scarrott* (1977), 65 Cr. App. R. 125, at p. 129:
>
> > . . . The gist of what is being said both by Lord Cross and by Lord Salmon is that evidence is admissible as similar fact evidence if, but only if, it goes beyond showing a tendency to commit crimes of this kind and is positively probative in regard to the crime now charged. That, we think, is the test which we have to apply on the question of the correctness or otherwise of the admission of the similar fact evidence in this case.

In *Sweitzer v. The Queen*, [1982] 1 S.C.R. 949, McIntyre J., speaking for the full Court, reiterated the application of the *Makin* principle but after assessing the effect of *Boardman* concluded that the categories referred to in Lord Herschell L.C.'s famous passage, while useful as illustration of the way in which similar facts may be relevant, were not exhaustive. At page 954 he states:

> The general principle enunciated in the *Makin* case by Lord Herschell, should be borne in mind in approaching this problem. The categories, while sometimes useful, remain only as illustrations of the application of that general rule.

In *Morris v. The Queen*, [1983] 2 S.C.R. 190, at pp. 201-3, Lamer J. stated:

> Thus came about, as a primary rule of exclusion, the following: disposition, *i.e.*, the fact that the accused is the sort of person who would be likely to have committed the offence, though relevant, is not admissible. As a result evidence adduced <u>solely</u> for the purpose of proving disposition is itself inadmissible, or, to put it otherwise, evidence the sole relevancy of which to the crime committed is through proof of disposition, is inadmissible.
>
> . . .
>
> Disposition the nature of which is of no relevance to the crime committed has no probative value and as such is as any other fact irrelevant and for that reason excluded. [Emphasis in original.]

And at p. 204:

> Its sole relevancy is through proof of the accused's disposition, the reasoning being as follows: that, because persons who are traffickers are more likely to keep such information than not, people who keep such information are more likely to be traffickers than people who do not, and that a person who traffics is more likely to have committed the alleged offence than a person who does not. The ultimate purpose of placing the accused in the first category (people who keep such information for future reference) is to put him in a category of people the character of which indicates a propensity to commit the offences of which he was charged. This is clearly inadmissible evidence.

It is apparent from the foregoing that a crucial factor in the application of the rule is identification of the probative value of the evidence. It must be identified in order to determine whether the evidence has relevance beyond mere propensity, and if it does, whether its probative value exceeds its prejudicial effect.

As stated by Wilson J. in *R. v. Robertson*, [1987] 1 S.C.R. 918, at p. 943:

> In discussing the probative value we must consider the degree of relevance to the facts in issue and the strength of the inference that can be drawn.

In the majority judgment in *R. v. D. (L.E.)*, [1989] 2 S.C.R. 111, we stated it as follows, at p. 121:

> The process of reasoning therefore is to determine whether the evidence of similar acts has probative value in relation to a fact in issue, other than its tendency to lead to the conclusion that the accused is guilty because of the disposition to commit certain types of wrongful acts. If the evidence has such probative value, the court must then determine whether its probative value is sufficient to justify its admissibility, notwithstanding the prejudicial tendency of such evidence.

To have probative value the evidence must be susceptible of an inference relevant to the issues in the case other than the inference that the accused committed the offence because he or she has a disposition to the type of conduct charged: *Morris v. The Queen*, *supra*, *per* Lamer

J., at p. 203. In that case the evidence was admitted because the majority, although agreeing with the observation of Lamer J. with respect to relevance, disagreed "with his characterization of the newspaper clipping in this case as evidence indicating only a disposition on the part of the appellant" (*per* McIntyre J., at p. 191 (emphasis added)). The law excludes this logically relevant evidence because "its logically probative significance is considered to be grossly outweighed by its prejudice to the accused, so that a fair trial is endangered if it is admitted" (*per* Lord Simon in *Kilbourne*, *supra*, at p. 757). As in the case of relevance, evidence can be logically probative but not legally probative. When the term "probative value" is employed in the cases, reference is made to legally probative value.

The principal reason for the exclusionary rule relating to propensity is that there is a natural human tendency to judge a person's action on the basis of character. Particularly with juries there would be a strong inclination to conclude that a thief has stolen, a violent man has assaulted and a pedophile has engaged in pedophilic acts. Yet the policy of the law is wholly against this process of reasoning. This policy is reflected not only in similar acts cases but as well in the rule excluding evidence of the character of the accused unless placed in issue by him. The stronger the evidence of propensity, the more likely it is that the forbidden inference will be drawn and therefore the greater the prejudice.

I am unable therefore to subscribe to the theory that in exceptional cases propensity alone can be the basis for admissibility. To say that propensity may have probative value in a sufficiently high degree to be admissible is a contradiction in terms. It is tantamount to saying that when the danger of the application of the forbidden line of reasoning is the strongest, the evidence can go in. The view has been expressed that this change in the principles outlined above was made in *Boardman*, *supra* (see L. H. Hoffmann, "Similar Facts after *Boardman*" (1975), 91 *L.Q.R.* 193, at p. 202).

The suggestion that *Boardman* effected a radical change in the law is not borne out by an analysis of the respective speeches in the House of Lords. In my opinion, the *Makin* decision was affirmed subject to the following: the view expressed by Viscount Simon in *Harris v. Director of Public Prosecutions*, [1952] A.C. 694, that the second limb of Lord Herschell L.C.'s dictum contained illustrations of relevance which are not exhaustive was reaffirmed. Furthermore, it was held that in some circumstances, acts of the accused are admissible notwithstanding their tendency to show propensity if those acts have a close or striking similarity to the act charged. The presence of such common characteristics between the acts of the appellant Boardman as testified to by the two complainant boys made the evidence of each seem probable. This conclusion could be reached only after excluding the possibility of collaboration between them after rejecting the hypothesis that the similarities might be due to coincidence.

Lord Morris affirmed *Makin* subject to the qualification I have mentioned. At page 441 he stated:

> There is no such specific rule which would automatically give admissibility. But there may be cases where a judge, having both limbs of Lord Herschell L.C.'s famous proposition (*Makin* v. *Attorney-General for New South Wales* [1894] A.C. 57, 65) in mind, considers that the interests of justice (of which the interests of fairness form so fundamental a component) make it proper that he should permit a jury when considering the evidence on a charge concerning one fact or set of facts also to consider the evidence concerning another fact or set of facts if between the two there is such a close or striking similarity or such an underlying unity that probative force could fairly be yielded. [Emphasis added.]

Earlier, at p. 440, he approved of the following passage from the judgment of the Court of Appeal in *Kilbourne*:

> What, for example, did Gary's evidence prove in relation to John's on count 1? The answer must be that his evidence, having the striking features of the resemblance between the acts

> committed on him and those alleged to have been committed on John, makes it more likely that John was telling the truth when he said that the appellant had behaved in the same way to him. [Emphasis added.]

Lord Wilberforce stated at p. 444:

> The basic principle must be that the admission of similar fact evidence (of the kind now in question) is exceptional and requires a strong degree of probative force. This probative force is derived, if at all, from the circumstance that the facts testified to by the several witnesses bear to each other such a striking similarity that they must, when judged by experience and common sense, either all be true, or have arisen from a cause common to the witnesses or from pure coincidence. [Emphasis added.]

Lord Hailsham explained the rule at p. 453:

> It is perhaps helpful to remind oneself that what is *not* to be admitted is a chain of reasoning and not necessarily a state of facts. If the inadmissible chain of reasoning is the *only* purpose for which the evidence is adduced as a matter of law, the evidence itself is not admissible. If there is some other relevant, probative purpose than for the forbidden type of reasoning, the evidence is admitted, but should be made subject to a warning from the judge that the jury must eschew the forbidden reasoning. [Emphasis in original.]

This explanation was adopted by this Court in *R. v. D. (L.E.)*, *supra*, at p. 120.

Lord Cross seems to support the theory that previous conduct that was simply evidence of propensity could on occasion be admitted. At p. 456, he refers to *R. v. Straffen*, [1952] 2 Q.B. 911, a case in which the accused who had committed two previous murders was charged with a third. All were committed in a peculiar fashion. In the opinion of Lord Cross, the evidence of the two previous murders was admissible even though "it was simply evidence to show that Straffen was a man likely to commit a murder of a particular kind" (p. 457). Nevertheless it is clear from his reasons that Lord Cross admitted the similar fact evidence not because it showed a general disposition to homosexual acts with boys but because there were sufficient

striking similarities in the evidence of each boy to rule out coincidence, collaboration having been negatived. At page 460, Lord Cross states:

> On the other hand, I think that when you have so few as two instances you need to proceed with great caution. It is by no means unheard of for a boy to accuse a schoolmaster falsely of having made homosexual advances to him. If two boys make accusations of that sort at about the same time independently of one another then no doubt the ordinary man would tend to think that there was "probably something in it." But it is just this instinctive reaction of the ordinary man which the general rule is intended to counter and I think that one needs to find very striking peculiarities common to the two stories to justify the admission of one to support the other. [Emphasis added.]

Lord Salmon, after expressly affirming the principles in *Makin*, *supra*, stated, at p. 462:

> The test must be: is the evidence capable of tending to persuade a reasonable jury of the accused's guilt on some ground other than his bad character and disposition to commit the sort of crime with which he is charged? [Emphasis added.]

Support for the proposition that evidence of general disposition to commit certain kinds of criminal acts is admissible solely for that purpose can be found only in the reasons of Lord Cross. His example using *Straffen* can be questioned. While the evidence in that case certainly was open to the inference he suggests, it was not admitted simply to show propensity to commit murder. The *modus operandi* was so similar that it provided positive evidence of identity. The basis for admitting the evidence, therefore, was relevance other than mere propensity.

The decisions of this Court since *Boardman* have interpreted *Boardman* in the manner that I have outlined above and have not espoused the theory that evidence adduced solely for the purpose of showing general disposition is admissible.

Furthermore, this analysis accords with the view expressed by the learned author of *Cross on Evidence* (6th ed. 1985). After quoting the passage from the reasons of Lord Hailsham, referred to above, that "what is *not* to be admitted is a chain of reasoning and not necessarily a state of facts", he comments, at p. 316: "This is a most important requirement, and understood correctly, helps make the similar facts rule much more comprehensible."

In summing up the section on Scope of the Rule, he states, at p. 321:

> It can now be seen that evidence revealing the accused's discreditable disposition is excluded under the similar facts rule only when such disposition is an essential step in the argument. If the evidence of disposition is irrelevant, it is excluded for that reason. If it is relevant, but upon a line of argument unconnected with the accused's discreditable disposition, it is, in principle, admissible, but remains subject to exclusion by way of judicial discretion if its prejudicial effect is regarded as sufficiently outweighing its probative value.

The learned author acknowledges that a case such as *Straffen, supra*, appears to be an exception to the view expressed by Lord Hailsham but opines that in such a case the evidence would have to be strong enough that it was equivalent to finding fingerprints at the scene of the crime (*Cross on Evidence*, op. cit., at p. 334).

When similar fact evidence is admitted on the basis that the accused committed the other acts in a highly distinctive manner, its admission may appear to depart from the policy that evidence of propensity alone is not to be admitted. Is such evidence admitted solely for the purpose of advancing the inference that because the accused was of a certain general disposition, the offence charged was committed by him or her? There is, in my view, a distinction between evidence of general character and *modus operandi*. What the law seeks to forbid is a process of reasoning that would condemn the accused because of the accused's character as a thief, a fraud, a liar or a person of violent character. On the other hand, a highly

individualized *modus operandi* is tantamount to evidence that the accused left his or her calling card. The process of reasoning which connects the accused to the crime charged is the same as in the case of other evidence of identification and is distinguishable from the prohibited line of reasoning. For example, if an accused charged with safe-cracking is shown to be a notorious safe-cracker and one of two or three people in the business who is capable of solving the intricacies of a particular security device, there are two aspects to the evidence. The accused is a safe-cracker and he has special expertise. No doubt if the evidence goes in, both aspects are capable of connecting him to the crime. Only the second aspect is permitted. I do not find it inappropriate to characterize the evidence in its second aspect as relevant to identity. If in a particular case the trial judge is of the opinion that a distinction between the two aspects is too subtle, then the admissibility of the evidence will be decided by weighing its probative value against its prejudicial effect: how great is the danger that the first aspect will predominate, and does the value of the evidence in its second aspect justify its reception?

This aspect of the law of similar acts need not be fully resolved in this case because the reception of the evidence is sought to be justified on traditional grounds. The trial judge treated it as relevant to identity while the Court of Appeal said it was relevant to the credibility of the complainant. McLachlin J. supports its admission on the latter ground and, perhaps what amounts to the same thing, as evidence useful to corroborate the evidence of the complainant. I now turn to consider the evidence in this case and whether it is admissible on these bases.

Application to This Case

Although my colleague and I differ somewhat on the interpretation of *Boardman*, the test for admission is stated by her to be as follows (at p. 000):

> . . . evidence of propensity, while generally inadmissible, may exceptionally be admitted where the probative value of the evidence in relation to an issue in question is so high that it displaces the heavy prejudice which will inevitably inure to the accused where evidence of prior immoral or illegal acts is presented to the jury.

Her reasons also refer to the rejection of the category approach to which I have alluded and to the tendency "to accord a high degree of respect to the decision of the trial judge" (p. 000). The probative value of the evidence is stated to be its relevance to the "issue of whether the complainant should be believed" (p. 000) and corroboration. Probative value apparently is used in the sense to which I have referred above.

I agree with my colleague's statement that it is important for the trial judge to spell out the relevance of the evidence and the issue to which it relates. This the trial judge did not do. Indeed, at two separate stages of the trial he misstated its relevance. In his reasons on the *voir dire*, he stated:

> In my view the admissibility of the evidence depends on whether the similarities are sufficient to show that the accused had common characteristics in the methods he used in the sexual acts with [the complainant and M.H.S.] and that it is likely that they are one and the same man.

This was repeated at the trial. Nowhere in the reasons is there any assessment of the prejudicial effect versus the probative value. It is pure speculation, then, to say that he treated the evidence as relevant to the issue of the credibility of the complainant. Having twice expressly stated it was relevant to an issue which is conceded to be in error, one would need to have some indication in the language in the reasons that the error had been corrected. I can find nothing.

Nevertheless, assuming his statement accepting the evidence of the complainant can be construed as relating the similar fact evidence to that issue, in my opinion that is an insufficient identification of relevance to an issue. The Crown's case was based almost entirely on the evidence of the complainant. The defence was a denial of the complaint. Any relevant evidence having the tendency to show guilt could be said to be relevant to the issue of credibility of the complainant. The credibility of the complainant is co-extensive with the issue of innocence or guilt. To say that evidence supports the credibility of the complainant is to say no more than that the evidence supports guilt. That could equally be said if the evidence was admitted for the purpose of showing that the appellant was guilty because he engaged in similar conduct on a prior occasion. More specific identification is required. In *R. v. D. (L.E.)* (1987), 20 B.C.L.R. (2d) 384, McLachlin J.A. (as she then was) referred, at p. 400, to the trial judge's characterization of similar fact evidence as relevant to background:

> To tell the jury that they could regard the evidence as "background" was, in my opinion, inadequate and calculated to mislead. "Background" is a loose phrase, capable of bearing many meanings, including the general inference which the law forbids that, because the accused acted wrongly on a prior occasion, he likely did so on the occasions giving rise to the charge.
>
> Second, I think the jury should have been told that the evidence could only be used for the limited purpose of establishing sexual passion and rebutting the defence of innocent association. In this connection, I think it would have been helpful to tell the jury that if they did not draw the inference of sexual passion from the evidence of the accused's prior misconduct, they should disregard the evidence.

This dissenting judgment was substantially affirmed on appeal to this Court (*R. v. D. (L.E.)*, *supra*).

That statement has application here. Although not a jury trial, the relevance of the evidence must be identified and its use for a purpose not prohibited by law identified.

The fact that the alleged similar facts had common characteristics with the acts charged, could render them admissible, and, therefore, supportive of the evidence of the complainant. In order to be admissible, however, it would be necessary to conclude that the similarities were such that absent collaboration, it would be an affront to common sense to suggest that the similarities were due to coincidence: see Lord Simon of Glaisdale in *Kilbourne, supra*, at p. 759. Only then could it be said that it was more probable than not that the complainant was telling the truth. There is nothing in the reasons of the trial judge to suggest that the evidence was considered in light of these principles.

Nor can the fact that similar fact evidence is useful as corroborative evidence of the testimony of children be a basis for admissibility. Before evidence can be treated as corroborative, it must be found to be admissible. It cannot be rendered admissible because it is corroborative. This is made clear by Professor J. A. Andrews and Mr. M. Hirst in *Criminal Evidence* (1987), at p. 337, para. 15.29, which follows the paragraph cited by my colleague. They state:

> It has subsequently been stressed that the admissibility of similar fact evidence never depends on whether there is other evidence which it can corroborate. Admissibility depends solely on its inherent cogency or probative force. Once admitted, it may then follow that there is other evidence which it serves to corroborate; but this is a consequence of admissibility, not a precondition for it.

In considering the admissibility of the evidence in this case, I observe that no attempt appears to have been made to negative the possibility of collaboration. No questions were directed to Crown witnesses to determine whether this possibility existed. The Crown, who must persuade the trial judge that the evidence has probative value, has the burden of proof. In England it appears that the mere possibility of collaboration is sufficient to exclude the evidence. In *Boardman, supra*, at p. 444, Lord Wilberforce stated:

> In the sexual field, and in others, this may be a real possibility: something much more than mere similarity and absence of proved conspiracy is needed if this evidence is to be allowed. This is well illustrated by *Reg.* v. *Kilbourne* [1973] A.C. 529 where the judge excluded "intra group" evidence because of the possibility, *as it appeared to him*, of collaboration between boys who knew each other well. This is, in my respectful opinion, the right course rather than to admit the evidence unless a case of collaboration or concoction is made out. [Emphasis in original.]

In my view, the Crown must negative conspiracy or collaboration in accordance with the criminal standard. This is a requirement that applies whenever a preliminary finding of fact is a precondition to the admissibility of evidence tendered by the Crown. I see no reason to espouse the tougher British standard.

There is then the further question of coincidence. Are the common characteristics in the evidence of the two girls so unusual that it would be against common sense to conclude that they are not both telling the truth? In this connection, the observation of Lord Cross in *Boardman*, quoted above, is helpful. We have only two instances and should proceed with caution. They are separated by a considerable passage of time and as well there are material differences which are detailed in the reasons of Harradence J.A. in the Court of Appeal. McLachlin J. stresses that in each case the appellant established a father relationship. As her statement of the facts indicates, the appellant was the father of one child and he enjoyed a father-daughter relationship with the other. These are not unusual facts and indeed are neutral. In any case, where it is alleged that a father has had an incestuous relationship with two of his children, this fact will be common to both. If one or both girls are not telling the truth, is it unlikely that they would both have said that the appellant established a father relationship with them? Obviously not, because that happened irrespective of whether the balance of their evidence is true.

In *Boardman*, Lord Wilberforce expressed the fear that the case, "if regarded as an example, may be setting the standard of `striking similarity' too low" (p. 445). While it is unfashionable to compare the facts of different cases, I fear that if this evidence is admitted, we are setting it so low as to be virtually non-existent.

Notwithstanding the rejection of the evidence, the trial judge could have accepted the evidence of the complainant and rejected the evidence of the appellant. If the evidence excluded all reasonable doubt, the appellant would be convicted. I am unable to say what would have occurred if the similar fact evidence had been rejected by the trial judge. Accordingly, I would direct a new trial. The appeal is therefore allowed and a new trial directed.

Appeal dismissed, Lamer *and* Sopinka JJ. *dissenting.*

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